Mr. Jaureguy: Yes, your Honor.

The Court: It may be filed. Normally, you would open any discussion on the motion. I understand you are waiving your opening argument?

Mr. Jaureguy: Yes, your Honor.

The Court: I will hear you, Mr. Marcus. Bring the motion and file it, Clerk.

Mr. Jaureguy: I would rather, in spite of the fact I am filing it right here, I would like to have an acceptance of service by Mr. Marcus.

OPENING ARGUMENT

Mr. Marcus: May it please the Court, in a case of this sort, your Honor, with a great many documents, normally the brief that is filed after the conclusion of the trial serves the function of analyzing in detail the various items of evidence and fitting them in the particular pattern counsel think has been made out by those items of evidence. I do not propose at this time to do what can be done only by such a brief. My purpose now is to outline in a general way what the Government thinks has been
1098 proved.

We started out, your Honor, by charging a conspiracy to control, restrict and monopolize the prepaid medical care business in Oregon, and on that basic issue we think the proof has been abundant.

In addition, our proof shows that illegal means have been used to effectuate that conspiracy. Our proof shows the effect of this conspiracy has been serious, substantial and widespread.

Our proof shows that the Oregon State Medical Society has had a great influence with respect to policies and acts of the county medical societies concerning contract practice of medicine and prepaid medical care operations in general.

Our proof shows that the primary means by which this conspiracy has been carried out, outside of the passing of resolutions and the like, have been the weapon of boycott, the use of disciplinary proceedings, refusal to admit to membership doctors who desire to associate themselves with prepaid medical care plans not approved by these defendants, and the use of the Oregon Physicians' Service as an affiliate to control, restrict and monopolize prepaid medical care business within the state.

Our documentary proof shows that from the very beginning these defendants have been motivated by economic

interests, by the desire to either eliminate or restrict competition in the prepaid medical care business.

By 1936 the State Medical Society had not only
1099 adopted but had widely publicized a policy to restrict the operations of hospital associations already in the field of prepaid medical care business.

By 1936 the Multnomah County Medical Society, in eager pursuit of that policy, had begun its policy of rule or ruin with respect to doctors who were associating themselves with hospital associations. The use of disciplinary proceedings to expel doctors or to require them to resign, or to require them to withdraw from practicing with hospital associations went on on a very large scale, during the years 1936 and up to 1940, and, as I shall bring out subsequently, did not even cease at that time.

By 1936 some of the individual defendants and some of the county medical societies which are defendants had participated in that policy and in the overt acts in pursuance of that policy and, soon thereafter, all the individual defendants and all the defendant county medical societies were in full participation of this conspiracy.

Our proof shows with respect to the individual defendants that they held responsible positions and offices in the defendant Medical Society, and that they actively participated in the formulation and carrying out of the policies with respect to prepaid medical care. Our proof shows that the policies were very widely publicized, not only among county medical societies but among doctors within the state generally, and even among the pub-
1100 lic generally throughout the state.

Our proof shows with respect to the Martzloff report, which was one of the most widely known reports with respect to prepaid medical care in the early days of this conspiracy, that with respect to that report it was sent to all of the doctors within Multnomah County and, in fact, to all doctors within the state.

Our proof further shows that the Oregon Physicians' Service was formed and that it and its affiliate organizations have been used to control, monopolize and restrict prepaid medical care business within the state.

Our proof shows that one of the primary reasons for the formation of doctor-sponsored prepaid medical care organizations within the state was to eliminate or restrict those organizations which were already in the field, with the hopes that once these organizations were gotten rid

of it would not be necessary to have such doctor-sponsored plans.

Our proof shows that from the very beginning these defendants conspired and did allocate territories within the state wherein competition among themselves and among their doctor-sponsored prepaid medical care organizations was eliminated.

Our proof shows that doctors have been excluded from participation in plans sponsored by these defendants, when those doctors were also participating or were willing to participate in the program of other prepaid medical care organizations.

1101 Our proof shows that doctors were excluded from participating in doctor-sponsored plans because they were unable to become members of the defendant Medical Society.

Our proof shows that, by agreement among these defendants, they had fixed the fees doctors charged for medical treatment under the prepaid medical care plans, and our proof shows that the Oregon Physicians' Service had fixed fees by agreement with the doctors themselves.

We have heard a great deal, your Honor, from defendants' counsel about a so-called division of time with respect to what the defendants did and what they are doing now. That period has been usually stated by the defendants to be the year 1941.

I could perhaps rest merely on the proposition that once a conspiracy has been shown it is presumed to exist, then, in the absence of an affirmative showing on the part of the defendants that they have taken affirmative action to withdraw from the conspiracy, but we are content merely to rely on the facts.

With respect to the operations of the Oregon Physicians' Service and its affiliated prepaid medical care organizations, of course most of the material we have offered relates to a period subsequent to 1941, but, in addition to that, as your Honor recalls from the witnesses who were heard and from the documents that are here in evidence, the boycotts of ten years ago are fully matched by
1102 the boycotts that exist this very day. The policy of these defendants with respect to hospital associations has been extended in the '40s, since 1941, to fraternal organizations, to Permanente, to railroad contract practice, to cooperative organizations, and to telephone employee associations. Reinstatement has been denied, since 1941, to doctors who have been expelled from membership or forced

to resign from the Medical Society because of associations with the hospital associations. Membership in the Defendant Medical Society has been denied since 1941 to doctors connected with Permanente and to doctors who were known to accept tickets of hospital associations and to cooperate with them. Disciplinary proceedings have been threatened within a year of the filing of the complaint against a doctor connected with the Eagles.

We think that that resume, your Honor, wholly takes care of whether or not this conspiracy has been continuing.

We have put in a great deal of evidence with respect to the interstate commerce aspects of this case. I will merely mention two at this time. Your Honor will recall that the Pumphrey Company, which was doing a substantial prepaid medical care business not only in this state but in the State of Washington, and which was dealing with doctors in Washington, with hospitals in Washington, with ambulance services in Washington, and with drugstores in Washington in connection with its business, was forced out of business by the activities of these
1103 defendants. Not only was interstate commerce affected in that instance but actually destroyed.

The second case I wish to mention at this time is that of Fluhrer's Bakery. That bakery had offices in Medford, Oregon, in Mt. Shasta and Yreka, California. All those offices were covered by the National Hospital Association for prepaid medical care. Because of the activities of these defendants that entire contract was lost. And there again we have interstate commerce not only affected but destroyed.

Now, I come, your Honor, to try to summarize briefly the theory of the Government's case. I may say that that is set out at some length in the trial brief we have already submitted to your Honor. But, in brief, we believe that men may not combine to control the market for prepaid medical care insurance. We believe that men may not combine to destroy or restrict the competition of those prepaid medical care organizations already in existence. We believe that men may not combine to restrict the operations of prepaid medical care organizations which the defendants themselves have sponsored. We believe that men may not combine to coerce doctors, employers, employees, and the public to take the prepaid medical care market in the way these defendants desire that that market be taken.

It is our view, your Honor, that this case falls squarely within the American Medical Association case decided some ten years ago. And, in addition, there are
1104 certain aspects of this case which bring this case squarely under other authorities.

Thus, with respect to the conspiracy to monopolize and the attempt to monopolize prepaid medical care plans within the state, that is an activity which falls squarely within the express language of the Sherman Act.

With respect to the allocation of territories, that is something which falls within the line of cases beginning, I believe, with the Addyston Steel case which is mentioned in our brief.

The matter of fixing fees brings the case, in our opinion, squarely within that line of cases exemplified by United States against Paramount Pictures and the Atlantic Cleaners & Dyers. Both cases are cited in our brief.

That, in short, your Honor, is what we believe we have proved and what we believe the theory of our case to be.

The Court: I would like you to be prepared to speak again, if I ask you to, after I hear Mr. Jaureguy.

Argument

Mr. Jaureguy: Before I address myself to some of the main problems of the case I would like to clear up a point on which Counsel and I were not in agreement the other day, the last day of testimony. It is something I suppose, in the nature of unfinished business. That is, your Honor asked a question as to whether or not at any time the employees could be compelled without their consent to have deductions from their wages for the
1105 purpose of paying for prepaid medical care, and I told your Honor that they could according to the language of the statute until it had been amended. I also called your Honor's attention at the time to certain abuses that have been testified to in a general way by Mr. Bechtold and the amendments that have been made to cure those abuses.

Now, I have checked the statutes rather carefully since then, and I want to say that in 1917 there was passed what is known as the Hospital Association Law. That is Section 101-901 to 101-909 of O. C. L. A. At the same time there was passed another statute authorizing employers to deduct from the wages of employees amounts that they determined to be proper, and to contract with hospital associations. By its terms they had the absolute right and

employees had no right to object except that if they thought the amounts were excessive they could appeal to the State Industrial Accident Commission, and thereafter only such amounts would be deducted as the State Industrial Accident Commission found to be reasonable.

The Court: What is the citation on that?

Mr. Jaureguy: That is 102-1401 and 102-1403.

So that I can now positively say to your Honor that from 1917 to 1941 the statute imposed the absolute right on the part of the employers to deduct these amounts from employees' wages, and any employee who would have desired to contest that would have been relegated to the defense that that statute was unconsitutional.

1106 Now to get back to Mr. Bechtold's testimony which appears on Page 587 of the transcript—

The Court: Pardon me. What happened in '41 to that statute?

Mr. Jaureguy: In '41 they passed a statute that I will refer to shortly which gives any employee who desires the right to object to having these deductions, and thereafter the deductions would not be made from that particular employee's wages.

Mr. Bechtold said that there were certain known abuses in the law.

The Court: What is the '41 amendment?

Mr. Jaureguy: The '41 amendment is Chapter 344 of the Laws of 1941.

Mr. Bechtold said there were certain abuses in the law and the law was thereafter amended to take care of those abuses. He did not state what the abuses were. He stated his recollection was the amendments were made in 1919. I have checked the law, and I find there were amendments made. They were not, however, made in 1919.

The first amendment was made in 1927, amending Section 102-1403, and the only amendment there that I think is of importance is that it limited the amount that could be deducted from an employee's wages during the first three days of employment at 10 cents per day, and thereafter it had to be a reasonable amount.

1107 Then in 1929 it was again amended to take care of abuses—Mr. Bechtold said they were abuses. I may say that prior to this amendment the statute provided that no employer could retain for himself any of the sums that he had deducted from the wages of employees, but must use it all for prepaid medical care purposes, for hospital association contracts.

In 1929, in order to take care of an abuse that was then presumptively existing, they amended it to provide that a hospital association, referred to as a contractor, could not rebate, pay to, give or agree to rebate, pay to or give to any employer any portion of the money such employer has collected.

Your Honor may recall that Dr. Moore testified that it was his understanding that some hospital associations would promise an employee "Mt. Hood with a strawberry on top of it" if they only signed up with them.

Then in 1941—the first statute says employers could not retain an amount. The amendment provided that the hospital association could not rebate to the employer an amount or agree to give him any amount he had collected. In 1941 it was further amended to provide that a hospital association could not pay any fee or commission to any employer, employee, or any third person except his own duly authorized agent.

Those are the amendments that have been made that I was referring to the other day. Since Mr. Marcus
1108 questioned them, I desired to call them definitely to your Honor's attention.

Now, Mr. Marcus has closed his argument by referring again to the American Medical Association case.

The Court: Let me interrupt you once more. What is the existing statute under which the State Insurance Commissioner exercises some supervision over hospital associations?

Mr. Jaureguy: It is part of the Hospital Association Law. That is Section 101-901 to 101-909. I don't have the exact section.

The Court: Have there been regulations put out under that other than what may be found in the statute?

Mr. Jaureguy: I think not.

I told your Honor at the beginning of this trial in my opening statement that the American Medical Association case was not on all fours with this case, and I explained some six or seven differences. But now that Counsel is referring to that in support of his last statement that he made to your Honor I want to say that the American Medical Association case is diametrically opposed to the contention which he has just made. In the American Medical Association case the Court of Appeals three times said that these defendants—and the defendants were the American Medical Association and the District of Columbia Medical Association—could by legitimate persuasion and

reasoned argument induce the doctors and the hos-
1109 pital associations and others to do exactly the things that they had endeavored to do by coercion.

Now, of course, I think it goes without saying, that before a medical society as an entity, as a group, can go out by legitimate persuasion or argument or anything else and endeavor to persuade anybody to do something, the medical society must first itself decide what it is going to do or adopt a policy. So I take it that there can be no question whatsoever, despite Mr. Marcus' argument to the contrary, that when a medical society feels that it is either in the public interest or is in the interest of members of the medical society to adopt a certain course or to endeavor to achieve a certain end, as long as the end itself is not unlawful they have the right to adopt a policy and they have the right to endeavor to induce others by persuasion and argument to follow that policy as long as coercive methods are not used.

A moment's reflection I think will demonstrate how absolutely unsound is the suggestion of Counsel. If he is correct in his contention, then such organizations as the Women's Christian Temperance Union are violating the criminal laws of this country, because they have adopted a policy whereby each of them has agreed that she will not purchase certain lawful commodities in interstate commerce, and they have done what they could to persuade other people that they should not purchase certain lawful commodities in interstate commerce. And what the
1110 American Medical Association case holds is that organizations such as that and medical societies may adopt policies and may endeavor to have those policies carried out as long as coercive methods are not used for the purpose of carrying out those policies.

Now, with those introductory remarks, I think I can perhaps be of the most help to the Court by taking up separately each of the specific charges that are made in this complaint and discussing them.

This is Paragraph 33 of the complaint. After they say what the medical societies decided to do, then they tell us "This is what they did."

Paragraph 33, on page 8, starting with subdivision (a): "Defendants have hindered and obstructed prepaid medical care organizations in their attempts to procure and retain qualified doctors to cooperate with them." And when I get through reading the rest of them I think it will appear that that is all they have now on which they can

possibly contend that any doctors are hindering or delaying—

The Court: I believe this will be a good time to break your argument.

(Short recess.)

Mr. Jaureguy: I was starting to discuss the first of the charges that they have made against the defendants, and that is that the defendants have hindered and obstructed prepaid medical care organizations in their attempts
1111 to procure and retain qualified doctors to cooperate with them.

Now, I can't help but feel that when this complaint was drawn whoever drew it was of the opinion that the contracts that are in vogue in Oregon now are the regular prepaid medical care contracts. But your Honor will recall that both the Industrial and the National Hospital Associations and others long ago came to the conclusion not only that it was in the public interest but it was in their interest, if they really wanted to do business, to please their members, to have every member have a free choice of physician, which would mean that every doctor in the State of Oregon potentially is to treat a patient who is obtaining benefits under a contract from a hospital association. In other words, in order to make the shift from the old system to the new system they drew indemnity agreements, insurance contracts, to indemnify the member.

They don't have anybody on their staffs, they tell us. Oh, the National has one or two for first-aid work and things down there. They didn't say they had any trouble getting them, Industrial, as I recall, has Dr. Moore, and, as I recall, that is all. Maybe one or two. But the rest is the State of Oregon—all the doctors. And their contract is an indemnity contract.

As their preparation for the case proceeded and as the trial proceeeded, as your Honor observed, finally
1112 it simmered down to this, and this is all: That there are some doctors in Oregon who do not take tickets.

I want to emphasize, because there has been some misunderstanding, that when doctors don't take tickets that doesn't mean that they don't treat the patients. It merely means that when the member of a hospital association goes to the doctor, the doctor instead of sending his bill to the hospital association sends his bill or hands his bill to his patient. That is the only thing that is left in their

case: That many doctors in Oregon—not most—many doctors in Oregon prefer not to or refuse to send the bill to the National Hospital Association. Instead they send it to the member. Your Honor will recall that both Mr. Bechtold and Dr. Moore, the principal representatives of the two principal hospital associations, said that was all right with them. Mr. Bechtold said that it was a matter of indifference to the National Hospital Association whether the doctor sent in the bill and accepted the check or whether the doctor gave the bill to the patient, as long as it was an itemized bill. Chester Moore said the same thing, and his conclusion was that therefore it is only a portion of the doctors who don't take tickets that are not cooperating, assuming that there is some meaning to that word "cooperating." I think perhaps Mr. Bechtold had it correct when he said it is cooperation with the patient and not with the hospital association.

Let's just review what the evidence shows on this.
1113 The hospital associations have not requested the doctors in Oregon to take tickets. The hospital associations have not advised the doctors generally in Oregon that they prefer to have them take tickets rather than give itemized statements. The contracts which the hospital associations have signed with the employers, and with the individual members, provide that claims under those contracts shall be made not by doctors but by the members. And, accordingly, a hospital association could with impunity disregard a bill from a member on the ground that the claim is not being made by the party that the policy provides the claim shall be made by.

I think your Honor will agree with me when you consider what you might call the Straumfjord-Olsen file, that that is not a mere captious point that I am making there, because when a hospital association will refuse to pay the widow of a decedent on relief on the ground that the claim should be made by the administrator of the estate, a hospital association, if they have a sufficient grudge, will also refuse to pay a doctor because the contract provides that the claim shall be made on behalf of the member.

As I say, it is only a portion of the doctors that refused to take tickets. They have given a list of some—I don't remember the number—in an exhibit here. I would say if is not over 100 doctors. Mr. Brunkow of the Industrial Hospital Association said he would hesitate to say that that is all the doctors that do not take tickets, and

1114 then after saying that he said, "No, that is not all of them." But, nevertheless, he had some hesitancy in saying so. Mr. Brunkow also, you will recall, testified that in the year 1948 there were 1400—I was surprised at that testimony; I didn't think there were that many—doctors, dentists, osteopaths, chiropractors, and other members of the healing arts in Oregon and elsewhere that did take tickets and send in their checks. I think that if we take these voluminous exhibits that the Government has prepared here of the proportion of business in Oregon and the proportion of business out of Oregon, and then examine the contracts and some of the letters there—the one from Mr. Kirk, for instance, that in one year they paid chiropractors in the State of Oregon less than one thousand dollars out of something like four hundred thousand dollars, I think we could get a pretty good approximation of the number of doctors that did take tickets. I would say it is probably between nine hundred and a thousand.

My recollection is that Mr. Bechtold's testimony was that most of them take tickets. And when you consider that the subpoena duces tecum that they issued to these hospital associations ordered them to bring in all documents, letters, and things of that type of doctors who do not cooperate or do not take tickets and things of that kind—and they are right over there—that would corroborate what I have just said.

When you also consider that there are many,
1115 many doctors in the State of Oregon, from the very nature of things, who have never had the problem presented to them whether they will take a ticket or not—there are some communities where this type of prepaid medical care has not yet reached. There are some types of illnesses that it does not cover; up to a year ago obstetrics, for instance. One of the defendant conspirators, who also is in the list that has been coerced, harassed and threatened so that he can't take tickets, as I pointed out in my opening statement, is an obstetrics specialist. And I may add that they now have in evidence here evidence that one of the defendant conspirators who, according to them, joined the conspiracy in 1936, in 1937 or '38, through what they claim was compulsion, notified the Multnomah County Medical Society that he no longer was going to work for the National or Industrial, whichever it was.

But anyway, that is getting off the point. My point is that this failure to take tickets in two respects is in no

way a violation of any obligation. In the first place, because the failure to take tickets is absolutely of no importance; and, in the second place, they have not shown that it is the result of any coercion or threats, or anything of that kind, on the part of any medical society or any defendant. In fact, with two minor exceptions, there was nothing that could be called concerted action by doctors resulting in a refusal to take tickets. Those refusals were in 1938 and in 1939. Then there was one in
1116 1940. And they had a few little doctors in Coos County; and there was another one in 1941, several doctors in Washington County. But those were not the result of any concert of action in the state, and certainly not of any possible conspiracy nor coercion. But, as the documentary evidence will show, those refusals were coincidental with those doctors having either their own prepaid medical care plans or inviting some outside organization to carry on prepaid medical care.

Now, if the failure to take tickets had been for the reason of destroying these commercial hospital associations, they had a weapon at their disposal much more effective than that. And I want to say honestly I can't understand why the doctors have been as "cooperative" as they have, because the evidence in this case shows, which is a matter of common knowledge, that in a private practice, what we might call private practice as distinguished from prepaid medical care, in the ordinary case of doctor and patient there isn't anything like a schedule of fees—this much for an operation; this much for this kind of treatment—but it varies from a small amount to a large amount, depending upon various factors that Dr. Moore related to us.

And the thing that has amazed me is the evidence which shows the rare occasions only in which when a man went into a doctor's office with a hospital ticket the doctor sent him a bill for an amount greater than the schedule of the hospital association. It is just amazing to me that
1117 doctors generally have charged members of these hospital associations less than they have charged their private patients. Why, if your Honor please,—and this is amazing to me—they have charged them less than the schedule of the OPS, because the documentary evidence in this case will show that the schedule of OPS, generally speaking, is considerably higher than the schedule of the commercial hospital associations.

Oh, yes. Counsel will say, "But OPS does not pay 100 per cent every month." And that is true, that what we might call the State OPS as distinguished from the local OPS's sometimes pays 100 per cent and sometimes pays less. Some months it has paid nothing. But some of the local units, local pools—one time I called it—the small OPS, have consistently paid 100 per cent.

In one of the two counties that they have particularly emphasized, that they have concentrated on, in Jackson County—why, to hear the testimony of their witnesses from Jackson County the sole aim in life of those doctors down there is to destroy hospital associations—in Jackson County the OPS has paid 100 per cent of the OPS schedule every month, a schedule much higher than the hospital association's schedule. And yet we have heard the testimony of witnesses from Jackson County that very rarely when they send in a bill to the hospital association was it paid other than in full, which means the schedule of the hospital association.

1118 And it seems to me that if Counsel cannot argue that a failure to take tickets, which Mr. Bechtold and Dr. Moore said was not evidence of not cooperating, assuming there is some obligation to cooperate, if that is an attempt to destroy the hospital associations then why don't the doctors do just what they have the absolute right to do, as Bechtold himself said, to charge the patient what he thinks the patient ought to be charged. Because Mr. Bechtold himself testified that they had made no attempt to tell doctors what fees they should charge.

But in addition to that what evidence is there here that the failure to take tickets is anything more than the voluntary act on the part of each doctor? While we have not produced our evidence yet, I think what we have produced on cross examination of Mr. Bechtold, particularly, and Mr. Page shows that the average doctor needs only to refer in his memory to what took place in the old days when he was taking tickets to convince him that, "No more of that kind of stuff for me. I am not going to have any layman in Portland writing me how I will treat a patient."

Mr. Bechtold says, "Well, we, through experience, have come to the place where we can give doctors suggestions on what to do and, therefore, I told Dr. Dodson of Medford that while I consented to his taking out the tonsils, nevertheless, he should wait a period of time before

1119 he conducted the GI examination because the involved tonsils may have something to do with the stomach trouble."

A layman in Portland who has never seen the patient claims he can tell a doctor in Medford, who has the patient under treatment, how he should treat the patient.

So, I say, in the first place, they have not shown that hospital associations in any way have claimed or contended that doctors should take tickets. In the second place, they haven't shown that is the result of any conspiracy or any coercion or anything of the kind. Not at all.

Oh, they do have a few letters that I have objected to, in writing, but, nevertheless, emphatically just because a few letters say that on account of the policy of such-and-such a medical society—my guess is maybe 10 per cent of the doctors wrote in and said they would not take tickets, giving that as a reason—maybe fewer.

My contention is that is purely hearsay evidence and I am convinced when your Honor evaluates these documents, when your Honor evaluates these various documents, your Honor will not take into consideration such portions of them as clearly are hearsay. And that is all they have.

As I pointed out, in the American Medical Association case, a medical society may take a definite stand on the subject, and doctors may follow the lead of the medical society if they want to

1120 Well, I want to hurry along. "(b) Defendants have expelled, threatened, and incited the expulsion from medical societies of doctors cooperating in prepaid medical care plans other than those sponsored or approved by the defendants."

It is true, of course, between 1936 and 1940, one of the defendant medical societies did expel from the medical society certain doctors because of violations by the doctors of the Code of Ethics of the medical society. That is all that the evidence proves. As I stated before, no doctor has ever been expelled from any medical society or threatened with expulsion from any medical society merely because he took a ticket and sent in his bill to a hospital association.

These expulsions were back in the days when the hospital associations had their closed panels, when they would always tell the patient which doctor to go to, and other things that appear in these transcripts, and dictate to the doctors how they would operate and what they would do.

Just one illustration: Dr. Palmer's testimony before the Board of Censors, the only time I think in all of these hearings that our friend, Commander Coughlin, asked a

question, and then he asked Dr. Palmer whether or not he did not take orders from Mr. Bechtold as to what he should do.

His answer was, "No, I don't. For years I was fighting with Mr. Bechtold every morning before breakfast,
1121 and since then I have not taken orders from him," but he took his instructions from other doctors.

So, I say no doctor was ever expelled or threatened with expulsion merely because he took a ticket or sent in his bill to a hospital association, and the last of those was in 1940.

In my opening statement I detailed many reasons which actuated some or all the doctors, and I emphasized that some reasons influenced some and other reasons influenced others. I said to your Honor at that time that I did not think it a mere coincidence, the decision of the Court of Appeals of the District of Columbia in the American Medical Association case, decided in the spring of 1940.

One of the documents in their files is a letter from a hospital association in which the hospital association says that after the indictment in Washington, D. C., the boycotts stopped. That is the only evidence we have, if there is some connection between the two. That is already in the files.

If that result was brought about by the mere indictment, then I think your Honor may well rest assured that the decision of the Circuit Court of Appeals also had an influence,—that is, was one of the influencing factors.

Of course, I think your Honor will agree with me—I hope you will—when I say that that is not at all inconsistent with my position that there is absolutely—I
1122 won't say absolutely no relationship—when I say that is not at all inconsistent with my position that the American Medical Association case is not an authority against us, but is in our favor. There is no inconsistency between those two decisions or two positions, rather.

The fact that the Government attorneys have fooled themselves into thinking that the American Medical case applies here I think is sufficient justification for doctors who did not know anything about the subject except what they read in the newspapers being of that opinion. It did influence them, too.

Another reason that I think is apparent is that the doctors decided they themselves would go out into competition with the commercial hospital associations. Times change.

We have got to admit that today doctor-sponsored prepaid medical care plans, including OPS, are doing some of the same things that they criticize commercial hospital associations for doing, back in 1936 and 1937—advertising, for instance. Of course, it is not that serious with OPS, because there is a choice of physicians among 70 per cent of the doctors in Oregon, or 65 to 70, something like that, but, nevertheless, it changed their method of doing business. Instead of their old method of expelling they are out actively competing.

Furthermore, that only took place in one county, Multnomah County; that is all. In Jackson County two
1123 doctors filed charges but the medical society never did anything about it, so I do not think it can be claimed that is an action of any defendant medical society.

Oh, they bring up things that happened in the last year or two, two instances. One was in connection with Dr. Holzman and the Eagles Lodge. There was no threat in that case. That was merely a conference between a group of the medical society and Dr. Holzman over how the Eagles was operated and whether the method of operation was a proper, ethical method of operation, and that is all. Neither in the documents nor in the oral testimony is there any evidence of any threat of any kind against him, unless you can say it is the last statement, that they would let him know what they were going to do. That certainly is not a threat.

Then, the other one, which was not an expulsion, something that they do not charge in their complaint, and that is that Dr. Klingler testified in 1948, at a meeting where there were several doctors and several laymen, somebody—but he cannot give us his name; cannot tell us whether it was a doctor or a layman—made the statement that if he took tickets he would not be admitted into the medical society, and that is the only evidence.

Of course, I think there is a world of difference, even though that statement was made and even though the statement did represent the feeling of a defendant so-
1124 ciety, both of which we deny—

The Court: Doctor who?

Mr. Jaureguy: Dr. Klingler.

The Court: Is that the young fellow?

Mr. Jaureguy: That is the fellow from St. Johns.

The Court: The young man?

Mr. Jaureguy: Yes.

The Court: He was with the Infantry in the war?

Mr. Jaureguy: I think that is right, yes. There is a world of difference—

The Court: Where was that meeting?

Mr. Jaureguy: It was downtown here someplace.

The Court: Was it a meeting that he was summoned to?

Mr. Jaureguy: Yes, he was asked to appear. No, he asked—he had been getting a bulletin or something of the medical society and he wrote in and said, "I don't know whether I am a member or not. I would like to find out," and they said, "Come on up and we will talk it over."

The Court: You said some laymen were present.

Mr. Jaureguy: Yes. The Commander was present.

The Court: He was the doctors' lawyer, the Society's lawyer.

Mr. Jaureguy: Your Honor, I am almost beginning to think that almost makes him a doctor. He was present. Mr. Foley was there—

1125 The Court: And Dr. Chuinard.

Mr. Jaureguy: Dr. Chuinard was the head of the group, yes. He was chairman of that group. That does not show any action on the part of the Medical Society, and it is something that is not charged. Furthermore, I think there is a world of difference between—

The Court: But he had a pending application for admission?

Mr. Jaureguy: That is right.

The Court: They had never acted upon it?

Mr. Jaureguy: That is right. There is a lot we could say on that, but it is not in evidence, so I won't say it.

The rest, I think we can go over the rest rather rapidly.

The Court: Don't be in a hurry.

Mr. Jaureguy: Your Honor, there is not much to say on the rest of them. I may so that I do not think I need to cite your Honor authorities, but I do have authorities that if something happened years ago which was improper, and is has not happened since, and there is no threat it is going to start in again, the Court cannot issue an injunction to enjoin people from doing something that they have not threatened to do.

The Court: I can see you are not up to date in that field.

Mr. Jaureguy: Is that so?

The Court: In the labor relations field they claim that even though a man has gone out of business he can

1126 be enjoined in case he ever gets back into business again.

Mr. Jaureguy: That is because of some experience that they claim to have had, where a man goes out of business and it is just a ruse and he goes back into business again.

The Court: Well, take it as is. The only testimony in the case may be that he never intends to go back into business.

Mr. Jaureguy: That is the National Labor Relations Board?

The Court: That is it.

Mr. Jaureguy: I am talking about courts.

The Court: So am I. There are decisions to that effect.

Mr. Jaureguy: As I understand the decisions, they are that the courts won't stop the National Labor Relations Board from—

The Court: There are decisions in the labor cases where charges have been brought by the Wage & Hour Administrator seeking an injunction. A man comes in and says, "I have sold out, gone out of business, never intend to go into business again, am leaving the state." The decision was to put him under injunction in case he ever goes back into business again.

Mr. Jaureguy: The only decisions I have found on the subject under the Sherman Anti-Trust Act are that injunctions will not be issued under those circumstances.

Of course, the American Medical Association case did not hold that expulsion of the doctors from the society in Washington, D. C., was itself a violation of the Sherman Act. They pointed out that there were other things
1127 influencing them. They had expelled doctors, preventing those expelled from consulting with members of the Society, preventing those doctors expelled from practicing in hospitals and preventing patients, members of groups, from being treated in any hospital.

The defendants on appeal argued, therefore, they were under four or five alleged conspiracies, but both the trial court and the Supreme Court held a combination of all of them is a conspiracy, and they never held that mere expulsion itself was in any way a violation of the Sherman Act.

Furthermore, there are things in this case different from the American Medical Association case. In the American Medical Association case they pointed out the doctors themselves had no personal grievance; it was not affecting their way of life; they could just proceed to take care of

their patients and let the other fellow take care of his patients.

The Circuit Court of Appeals emphasized very strongly the distinction between group health and commercial hospital associations, and the Anti-Trust Division in its briefs emphasized very strongly the distinction between the two.

But in our case every doctor in Oregon had a personal interest, just as the public had a personal interest in what was going on. I think every time the question has been before the courts, whether or not these hospital associations, operating as they did in the '30s, from 1936 to 1940, whether or not they were ethically operated, have all held that they were illegally practicing medicine. Those
1128 decisions, I want to say, were not based on a mere technical construction of the statute.

In the language of the Supreme Court of North Dakota, which has been quoted by other courts, the vice of the operation of these hospital associations, where they operate in that manner, as distinguished from the indemnity business, is that they are debasing and degrading the honorable profession of the practice of medicine, and that it is against public interest to have that profession thus degraded and debased.

The Court: Of course, Mr. Mareus' answer to you is that the 1917 Act gave them that in Oregon.

Mr. Jaureguy: Yes, that is his answer, and my reply is this: I do not think that a construction of the Hospital Association Act of 1917 justifies a layman in telling a doctor how he should treat the patient. It justifies them in going out and selling contracts for medical services. It justifies them in designating who would be the doctors that would perform the medical services; but once a patient walks into a doctor's office there is nothing in that Act that justifies the conclusion that a layman, even though he is connected with a hospital association, has a right to tell that doctor how he will take care of the patient, and that I think was the greatest vice of the hospital associations from 1936 to 1940.

The Court: Dr. Moore was not a layman and Mr. Bechtold is a lawyer. How could you call either one of
1129 them laymen?

Mr. Jaureguy: Well, when I speak of "laymen" I mean somebody outside the particular profession that is involved. In other words, with respect to the medical profession I am a layman. I won't say with respect to the legal

profession; but if you will look in that file there you will find letters to doctors—

The Court: Do you remember what Dr. Moore called himself? He designated himself as Medical Director.

Mr. Jaureguy: Medical Director.

The Court: Yes.

Mr. Jaureguy: If you will look in that file, you will find letters going out to the doctors, telling them what they can and cannot do, and they were written by a layman.

The Court: Written by Mr. Kirk.

Mr. Jaureguy: Written by Mr. Kirk, yes, your Honor, many of them.

My second answer is this: That the mere fact, even though they were operating under the law is no reason why a medical society, which is itself concerned, which has a grievance of its own, even if it is doing it for the public interest, has not the right to go out and oppose it, just like the ladies of the W. C. T. U. have the right to go out and actively oppose liquor traffic, even though we have laws saying that you can ship liquor and you can sell it and you can consume it and that, therefore, it is an article of interstate commerce, even then they have the right;
1130 they are strictly under the law. Certainly to the extent of saying, "Our members are only going out and opposing it, members who do not engage in that practice." That is the sum total of what they did.

The Court: You do not claim they are doing that now, do you? You have just said that is what they did in those days. You do not claim they are doing it any more?

Mr. Jaureguy: No, your Honor. It makes a whale of a lot of difference, it seems to me, whether the letter that is being written by the hospital association is being written to a doctor whom they have under contract or being written to the patient. Under the present system I think that has pretty well gone out. It has pretty well gone out, I think. I think, if doctors uniformly took tickets, it would come back in. It has not entirely disappeared. We do not concede that at all.

The Court: What is the record? Has the State Medical Society in recent times or fairly recent times renewed its opposition?

Mr. Jaureguy: No. I should have said I think I have found that decision your Honor is talking about.

The Court: You said a moment ago in those days, 1936 and so on, when they were insisting that their members

should not do certain things, the things you are talking about, see?

Mr. Jaureguy: Yes.

The Court: In those days it was the Medical Society's policy, and was enforced, passed on to all of its
1131 members—

Mr. Jaureguy: The Medical Society policy with respect to the old system of closed panels and dictating to doctors.

The Court: What is the policy now, competitive associations?

Mr. Jaureguy: Their policy is to go out and compete with them, and that is all.

The Court: That is all?

Mr. Jaureguy: Yes.

The Court: No more?

Mr. Jaureguy: No more.

The Court: That is what this case is about, isn't it?

Mr. Jaureguy: That is what I think, yes.

The Court: Whether doctors themselves can compete with private hospital associations?

Mr. Jaureguy: Yes.

The Court: And, if so, how far they can go?

Mr. Jaureguy: Yes, that is right. That is correct.

The Court: Mr. Marcus says they are attempting monopolize the field. You are not prepared to admit that, are you?

Mr. Jaureguy: No, I am not prepared to admit it. As I said in my opening statement, you can find doctors that say, "That is just what we want to do." You might find some who would say, "That is what we want to do," but I can pick out many doctors, including the defendants, who say, "No, it would be a big mistake."

1132 The Court: They have the same rights to compete in their field as any other businessmen?

Mr. Jaureguy: I say they have a right to a monopoly. I say they are not attempting to go out and never will go out—what I mean to say is that they can and would make a monopoly by competing, that there is nothing in the Sherman Act or any other law that prevents them, on account of the nature of their organization.

The Court: Different from a commercial enterprise?

Mr. Jaureguy: Yes. The nearest analogy that I have found in the law books, and it is not a very close analogy, is the Associated Press. In that Associated Press case we have the converse of the present case. The Government

was claiming that the Associated Press was keeping out persons, discriminating against certain newspapers from the use of the Associated Press service, and this was in the District Court, a three-judge court. Judge Learned Hand is the one who wrote the opinion.

The attorneys for the Associated Press argued that "if you make it too easy for all newspapers to come into the association, into the Associated Press, why, we will have a monopoly, and then we will be violating the Sherman Act," and Judge Hand answered that by saying that where a monopoly consists of all persons interested in a situation, why, it is not a monopoly at all, and there is nothing in the Sherman Act against it.

1133 There, as here, members of the public were primarily interested, and when he said all were interested he was referring to the newspapers; and the same way here, we are referring to the doctors.

But here, which was not even true in the Associated Press case, we are dealing with the sale of the services of the doctors, and I say that if the doctors combined and did obtain a monopoly on the sale of their own services, and that is all, that there is nothing in the Sherman Act to prevent it, because they are not selling commodities; they are selling their own services.

I could go into this at quite some length, in quite some detail. It also covers their argument on the fee schedule. Of course, the only fee schedules are fee schedules in connection with prepaid medical care plans; but if you want to cover this field, we would first have to start with the opinion of Chief Justice Shaw in that famous Massachusetts case of Commonwealth v. Hunt in 1840 and right on up to that decision of last June in the District Court in Washington, D. C., in the case against the Real Estate Board, in which the Court in Washington, D. C.—and that was an anti-trust case—said that the right of persons to control their own services and how they will be rendered and the amount for which they will be rendered is different from the sale of commodities and, therefore, they sustained a demurrer to the indictment against the Realty Board for fixing a schedule of fees in Washington, D. C.

1134 The Court: What happened to that case afterwards?

Mr. Jaureguy: I don't know, your Honor, what happened to it. At the same time they had a civil suit and that is pending. I saw it in the Court of Appeals Advance Sheet. The defendant contended that the decision on the demurrer

in their favor in the criminal case was res judicata and the Court of Appeals held it was not.

The Court: Did they lose in the civil case?

Mr. Jaureguy: I think not. The decision in the Court of Appeals was only, as I recall, about six weeks ago.

Mr. Marcus: If your Honor would like to know on that point—

The Court: We will recess until 2:00 o'clock. You tell us what happened, yes.

Mr. Marcus: The civil case was tried on the same record as was made in the criminal case, and the Court ruled against the Government, and the last I knew of the matter was that an appeal had been taken to the Supreme Court. What has happened I do not know, whether the Supreme Court has acted—

The Court: Mr. Jaureguy just said the case is in the Circuit Court of Appeals.

Mr. Jaureguy: No. The Circuit Court of Appeals opinion—I think Mr. Marcus will agree with me they first filed a motion for summary judgment on the ground it was res judicata.

Mr. Marcus: The defendants did.

1135 Mr. Jaureguy: Yes, on the ground that the criminal decision settled it, and that was decided against them, and the Circuit Court of Appeals affirmed that it was not res judicata and then Mr. Marcus took it up from there.

The Court: Was the case lost in the District Court?

Mr. Marcus: Yes.

The Court: What judge tried it, do you remember?

Mr. Marcus: Holtzoff.

The Court: Was the criminal trial decision printed? Are there printed proceedings?

Mr. Jaureguy: The criminal case was printed, yes. I have the criminal case here. It was last June.

The Court: Was certiorari taken directly from Judge Holtzoff to the Supreme Court?

Mr. Marcus: In all anti-trust cases that is where the case goes.

The Court: Directly?

Mr. Marcus: Directly to the Supreme Court.

The Court: That is where my case will go.

Mr. Jaureguy: This is 84 F. Supp. 802, the criminal decision.

The Court: 2:00 o'clock, Gentlemen.

(Thereupon a recess was taken until 2:00 o'clock P. M.)

Court reconvened at 2:00 o'clock P. M. November 10, 1949.

The Court: Continue, Mr. Jaureguy.

Mr. Jaureguy: If your Honor please, I was talking about monopoly, and that we attack that on three fronts. Merely to round it out as to the other two points, when I say that a monopoly by the doctors for the sale of their own services would not be contrary to the Sherman Act I do not mean to imply that such a monopoly is threatened or that there is any possibility that it could take place. But I had referred to the opinion of Judge Learned Hand in the Associated Press case. In that case the Associated Press argued that if they made it so easy to get their services as the Government wanted them to they would soon be a monopoly, and Judge Hand answered it—I thought I had it here. This was United States against Associated Press, 52 Fed. Supp. 362, on 369, 368 and 369, 370 and 371, 373, 374 and 375, where he discusses the general question of restraint of trade at common law, and points out that the question is a matter of balancing of interests. And he cites the Restatement of Torts, Section 765. On the matter of competition page 768 is also important. He says that: "Outside of well-known categories"—which are categories of price-fixing for commodities and two or three others he mentions—"when a situation does not fall into one
1137 of them the Court is forced to weigh the advantages gained by the combination against the injury done to the public."

And I want to suggest to your Honor that that is the criterion in this case. Apparently in this action the public is the purchasers or consumers whom the combination will deprive of this advantage they derive from free competition.

Then on the question of monopoly, in answering the argument of Associated Press:

"That is perhaps a possibility,"—that is, that the Associated Press some day will be the only news service—"though it seems to us an excedingly remote one; but even if it became an acuality, no public injury could result. Or, if A. P. were open to all who wished the service, could pay for it, and were fit to use it, it would be no longer a monopoly: A monopoly of all those interested in an activity is no monopoly at all, for no one is excluded and the essence

of monopoly is exclusion. A. P. would then be only a collective effort of the calling as a whole." Just as in this case OPS would then be a collective effort of the calling as a whole. "If other services were incidentally driven out, that would not be an actionable wrong."

But, as I said before, if there is any widespread desire among the doctors of this state that OPS be the only organization selling prepaid medical care, it not only does not appear in any of the evidence in this case, but, cer-
1138 tainly has not come to my attention.

As I say, there are doctors who feel that way. They have in evidence here a statement by a doctor in Medford, that that was the purpose of the Southern Oregon Medical Association, or the OPS, or something. They probably could get other doctors who would so testify. But there certainly is no evidence of any feeling that that is universal among the doctors.

Our attack on the third front, as I said in my opening statement, is that this is a case where a page of history is worth a volume of logic; that since this alleged conspiracy started the business of commercial hospital associations has grown three or fourfold, from three to four times as much business as they had then. There is certainly no indication that there is ever going to be a monopoly on this.

When I got off on the matter of monopoly I was discussing the proposition that under the common law of restraint of trade, which is really what we have involved here under all these decisions, men have a much greater right to combine together for their mutual advantage when the question is their own services, how they will render them, to whom they will render them, under what conditions they will render them, and the prices they will charge for them, than when they are combining together for the purpose of selling a commodity or even selling the services of other persons, as in the Cleaners and Dyers case in Washington, D. C. And I said that a review of this subject—at least, when I reviewed the subject I started
1139 with the early case in 1842 of Commonwealth vs. Hunt, that famous opinion of Chief Justice Shaw of the Supreme Judicial Court of Massachusetts, which is in 4 Metcalf (45 Massachusetts) 111, and we end our study of the problem, it seems to me, in the opinion last June in the District Court for the District of Columbia, the same district that had the American Medical case, with the case

of United States against The Realty Boards, holding that men can combine together when their own services are involved to so much greater extent than they can when the services of others or the prices of commodities are involved.

That famous case of Commonwealth against Hunt, which I think has been cited a hundred times, at least, with approval, was a bootmakers' society who agreed among themselves that they would not work for a certain employer who hired persons who were not members of the society. Chief Justice Shaw discussed the common law of conspiracy and restraint of trade page after page, and held that there was no common law rule against combinations of persons for the purpose of bettering their own living conditions or the circumstances under which they would render service.

I think it is valuable to go back to 1842 on that because then we know we are talking about common law. Today I think, even though the judge does not cite a statute, in the background of his consciousness are some of
1140 these labor statutes, the Norris-LaGuardia Act and the Wagner Act, and the other acts, but when we go back there we are dealing with the common law on the subject.

He cites this suppositious case: "Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with anyone who used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it." After pointing out that that would have many unfortunate results, he said: "Still it seems to us that as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy."

He also takes up a suppositious case which really involves another branch of this subject, and that is when persons go out in competition they are entitled to do certain things and achieve certain results that they would not be entitled to do if they were not in competition. He gives this illustration, which has been used by others. I think it was used by Mr. Justice Holmes in that famous article he wrote in 8 Harvard Law Review on page 1, or a similar one, anyway:

"Suppose a baker in a small village had the exclusive custom of the neighborhood, and was making large profits

by the sale of his bread. Supposing a number of those neighbors, believing the price of his bread too high,
1141 should propose to him to reduce his prices, or if he did not, that they would introduce another baker; and on his refusal, such other baker, should under their encouragement, set up a rival establishment, and sell his bread at lower prices; the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him."

And yet, though they would not be permitted to achieve the result of driving somebody out of business by coercion or by secondary boycotts, if they were not competitors, by a variety of other means when they are competitors they can do things that they cannot do when they are not competitors.

There is quite a lot of other law on that subject, including the Restatement, Section 868, and Prosser on Torts, Section 105, goes into it in some detail, about the advantages that people have when they are in competition; that they can inflict injuries that they cannot when they are not in competition.

But to get back to the general subject of the right of persons to combine and make agreements when their own services are involved, in Rohlf v. Kasemeier, 118 Northwestern 1276—this was an Iowa case which dealt with the common law of conspiracy and restraints of trade—physicians had entered into an agreement fixing and maintaining their fees; in other words, a schedule of fees for physicians to charge private patients. Not a schedule of fees to charge under prepaid medical care, but a schedule of fees
1142 generally. And the Court made this statement, which has many times been quoted by other Courts: "It seems to be the almost universal holding that it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain classes of men, or work under a certain price or without certain conditions."

Now I made a mistake when I said this was at common law. This was under a state anti-trust act. And they said that the common law rules of restraint of trade applied.

Then in another case involving an anti-trust statute, State against Duluth Board of Trade, 121 N. W. 395 (Minnesota), particularly on pages 411 to 413, there is a good discussion of the subject, where the members of the

Board of Trade agreed on what commissions they should charge.

And then, of course, we have the case last June in the District of Columbia that real estate men may combine together for the purpose of fixing fees.

Now, I think that takes us from this general subject to the next that we have been charged with: "Defendants have formed and promoted their own prepaid medical care plans with the intent to drive out, hinder and obstruct other commercial medical care plans operating in the State of Oregon."

In one sense, excepting for driving them out, that is true. Any time a group of men enter into competition
1143 with another group of men they hinder and obstruct the other group of men. That is competition.

Not very long ago I was reading part of the record in the American Medical case, and the argument for a directed verdict. One of the attorneys for the Government got all steamed up in his argument and he pointed out to the Judge, which is a fact as is proved by the record, that some of the defendants, instead of proposing that they do what they did do, using coercive methods, had suggested that they form their own prepaid medical care plan. And quick as a flash the presiding judge interrupted them and said: "Well, that is exactly what the Sherman Act is intended to promote—competition." And that is a fact, that in that medical case the committee gave a report in which they gave several possible alternatives.

The Court: What judge said that?

Mr. Jaureguy: I don't remember the name of the judge who did say that.

The Court: Which court was it?

Mr. Jaureguy: That was in the District of Columbia, the American Medical case in the District of Columbia.

The Court: Of course, it was in the District Court?

Mr. Jaureguy: Yes, but I am referring now to the arguments of counsel. I believe it was Groner—

Mr. Marcus: Proctor.

Mr. Jaureguy: I think you are right.

1144. But in that case the committee of the District of Columbia Bar gave a report on what they were going to do about this, and they gave several alternatives. They recommended that they take the alternative of competition, but that was turned down. I think this was a minority report that was turned down. And when it came

to—I think the Supreme Court, either the Circuit Court of Appeals or the Supreme Court, pointed out that these medical societies had the alternative either to do what they did or, if they didn't, to enter into what this Court called the bitterest kind of competition.

In this case, while the doctors in Multnomah County, and only in Multnomah County, first thought that they would attack the problem in a manner somewhat similar to the District of Columbia but not going so far, they later revised it and entered into this competition, the very thing that the Sherman Act is designed to promote. And yet counsel in this case say that when we did the very thing that the Sherman Act encourages, enter into competition, that was part of our conspiracy.

The Court: You mean the Multnomah Medical Society, the Multnomah medical plan?

Mr. Jaureguy: No, I am referring now to the doctors of the state. In 1941, and prior to that, in many counties they had attacked it by competition as early as 1930 in Salem, and earlier than that in Eugene. But in the fall of 1941 it was made statewide. "We will attack this by means of competition." And yet they charge that this com-
1145 petition is one of the means by which we carried out our conspiracy to restrain trade.

The Court: Attack what? When you say "attack this" what do you mean? Attack what?

Mr. Jaureguy: Attack the general problem of prepaid medical care. And in so far as the commercial hospital associations are concerned attack the problem of a lack of free choice of the physician and of interference with the doctor-patient relationship that existed there by putting up a plan that eliminated those evils. And coincidentally with that, about the same time the commercial hospital plans themselves eliminated the evil of not having a free choice of physician.

The Court: There has been very little said in the case so far about the part of the hospitals.

Mr. Jaureguy: I am coming to that, if I might. I have them listed here. I will come to that.

Then their next is that the defendants have interfered with commercial prepaid medical care organizations other than those sponsored or approved by them in obtaining hospital facilities for their members.

That is just absolutely preposterous. They have not given us a scintilla of evidence of any member of any hospital association who has ever been refused any hospital

facilities because of any connection, however remote, with any prepaid medical care plan. Not in the least.

1146 "Defendants have refused to treat patients and have caused others to refuse to treat patients who are members of a prepaid medical care plan not endorsed by defendants unless the patient pays cash."

When I first read that I thought they meant cash on the line when you are treated, but I take it from the More Definite Statement that that perhaps is not what it means. It means that the patient pays instead of the hospital association.

I have gone over this already, that the doctors, even according to Dr. Moore and Mr. Bechtold, as far as the doctors are concerned they have the option either to send the bill in to the hospital association or to treat the patient, have the patient pay it. And as far as cash on the line is concerned—oh, they have the testimony of Mr. Furrer that Dr. Lemery and Dr. Clancy each refused to treat men unless they put the cash right on the line. And then they brought up a man clear from Medford to give his experience with Dr. Lemery.

Do you remember what that was? He had a sore throat, so he went up to Dr. Lemery and had it sprayed and some treatment, and all the conversation he had about prepaid medical care was with the office girl, and when he went out he handed her the ticket. She said, "No, we don't take tickets, but I will give you a bill and you can get reimbursement." She gave him a bill—it was $3.00—and voluntarily —he wasn't asked to pay it then rather than later—
1147 voluntarily he paid her and walked across the street and got reimbursement. And they brought somebody clear from Medford to testify to that.

Then next: "Defendants have refused and encouraged other doctors to refuse to give patients who are members of a prepaid medical care plan not endorsed by defendants itemized statements that will enable the patient to be reimbursed under the plan to which he has subscribed."

I don't know whether they have abandoned that or not, but when they questioned Mr. Bechtold about the defendants they confined that questioning merely as to whether the defendants took tickets. They didn't go any further. As far as others are concerned, did you notice the almost unanimity with which employers testified that when they send these bills from the doctors in to the hospital asso-

ciations that they were paid immediately, or rather they were paid, and the hospital association testified they would not pay them unless they were itemized? In fact, I would say there is a total lack of evidence of any doctor refusing to give itemized statements.

Now, they put on here a case history and I am assuming they put it on because it is the best they had. That involved Dr. Matthew Riddle. When I heard the name I knew there was something wrong with their theory of the case. And their hearsay evidence about it was that Dr. Riddle refused to give any itemized statement. Well, I looked at the statement that they had and it didn't look to me as though there was any failure to give an itemized
1148 statement. So in order to round it out or get first-hand testimony they brought the patient, Mrs. Boyd. What was her testimony? The only conversation she had with Dr. Riddle was that they did not take tickets; they would give her a bill. All the rest was with the office girl. And there it was not a refusal. It was merely a little delay. And when she got the statement it was itemized, and she took it over and got her payment, and she says that is all there was to it.

In between those two witnesses I had questioned Mr. Bechtold of the other hospital association, and I had memorized what was on that itemized statement, and so I asked him, using the exact words of the itemized statement but without referring to the case, "If a statement comes in where it says 'Examination; urinalysis; blood count; basal metabolism test,' do you consider that as a sufficient itemized statement?" He said, "Oh, yes, certainly; that is sufficient." Well, that was the itemized statement in the Matthew Riddle case.

The Court: You have forgotten the business agent of Seaside who said he was going to take that $6.00 bill back and raise Ned with the doctor. He had it in his pocket.

Mr. Jaureguy: I have forgotten that.

The Court: I let him keep it so he could go back and have it out with the doctor.

Mr. Jaureguy: I have forgotten that, and even now it doesn't refresh my memory.

1149 The Court: Don't you remember it, Commander?

Mr. Coughlin: Yes, sir. That was an itemized statement.

The Court: No, it wasn't. It said "Services, $6.00." He was going back and have it out with them, he said.

Mr. Jaureguy: Yes, there are instances that have been testified to—I mean in a general way there might have been other specific cases that have escaped my memory.

The Court: Don't you remember that man?

Mr. Jaureguy: No, I don't remember him.

The Court: We didn't make it an exhibit. We let him keep it so he could go out and have it out with the doctor. He mumbled that as he walked across the floor there.

Mr. Jaureguy: There is some general testimony that when the first bill is received it is a general bill, just like the kind my office sends out for legal services, and just like the kind I get from my doctor.

The Court: You don't itemize your legal bills, do you?

Mr. Jaureguy: No. I say there is testimony that bills have been sent out by doctors to members of hospital associations that were not itemized, just like doctors generally send to their patients that are not connected with them, but there is nothing—

The Court: You won't itemize your bill in this case, will you?

Mr. Jaureguy: Oh, no. No, your Honor. And I don't have some corporation that is going to write me and
1150 say, "Was that motion necessary? Don't you think that you could have gotten along with three conferences on so-and-so instead of four, like you put down? Do you think it was necessary for you to appear in court six times on this motion for subpoena duces tecum?

The Court: You could say it was that judge up there.

Mr. Jaureguy: Yes, but I won't have an organization that has engaged my services giving me that kind of criticism. But there is no evidence that when the bill was returned in any such case to a doctor that the doctor then, when his attention was called to the fact that they wanted an itemized statement, refused to give it, and much less any suggestion that there has been any attempt by defendants, or any of them, to induce doctors not to give itemized statements.

Then here is one of the most preposterous things. You see what they did here? It is obvious. What they did here, they just set down all the allegations that had reference to the American Medical case. This gives us a resume of what happened in the American Medical Association case:

"(g) Defendants have refused to consult or assist and have encouraged others not to consult or assist doctors

who treat members of a prepaid medical care plan not endorsed by them."

Isn't that preposterous? Not an attempt to prove that; not a single instance in which it happened. In
1151 their More Definite Statement they give two or there instances. I think in two of them they don't know the initials of the doctor, and in the third place they don't know his address. There is not a bit of evidence on that.

"(h) Defendants have spread false propaganda among doctors, hospitals, and the general public for the purpose of discrediting any prepaid medical care plans not endorsed by them."

What false propaganda? We have hearsay evidence given by Roscoe Hurst to the effect that some of his prospects told them that the hospital associations don't pay their bills. We have evidence they took by deposition substantiating that that is the fact. What other false propaganda they have I don't know.

"(i) Defendants have agreed among themselves and with others not to compete with each other for prepaid medical care business or with other similar organizations approved by or affiliated with them."

Well, in a sense, of course, that is a true statement, and that is only in this sense: That it has been agreed among the medical associations of the state that the doctors in Lane County will not go down to Marion County or Jackson County for the purpose of selling their own prepaid medical services. Well, it is their own services they are selling. The Medical Society recognizes that one doc-
tor does not want to go out and sell another doctor's
1152 services. He is only selling his own services, and the doctors in Lane County are only interested in selling the services of doctors in Lane County to the patients of the doctors in Lane County, and not any of the rest. Well, if that has anything to do with interstate commerce, why, we are guilty to that extent. I think when people are dealing with their own services, however, they can agree among themselves, "I will take this side of the street and you take that side of the street. I will take this county and you take that county."

They have cited some cases to the effect that allotment of territories by dealers in commodities is a violation of

the Anti-Trust Act, and one of the leading cases is Addyston Pipe Steel Company against the United States, 175 U. S. 211, which they cite on Page 15 of their brief. And it does hold that, but that is an allotment among states.

In that same case that they cite, when you come towards the end of the case, 247, they point out that if that is contained within a single state, by corporations doing business in that state, that has nothing to do with the Federal Anti-Trust Act; the Federal Anti-Trust Act does not touch it, and that is all that is done here. Furthermore, these services are not commodities.

"(j) Defendants have succeeded in making hospital facilities in Oregon available only to members of Defendant Oregon Medical Society and its component county medical societies, and have restricted and excluded other
1153 qualified doctors cooperating in prepaid medical plans other than those sponsored or approved by defendants from access to such facilities." —

They were bound to bring in things that were in the American Medical Association case, even though they did not have a chance in the world of proving them.

There is not a scintilla of evidence, not a scintilla, that any doctor in Oregon has ever been denied facilities of any hospital because of any association with prepaid medical care plans.

In fact, Dr. Sabin, who was one of the chief workers for the National in the early days,—

The Court: And also a stockholder, wasn't he?

Mr. Jaureguy: —and a stockholder, not only continued at St. Vincent's, but the doctors up there and the hospital staff raised a fund for a memorial to him.

The doctors who have testified here, Dr. Belknap and others—this man with Permanente—admitted at Emanuel and admitted at Holladay—not a scintilla of evidence of any doctor ever being kept out.

The Court: What is his name, for the record?

Mr. Jaureguy: Ullman, U-l-l-m-a-n.

Those are things they have charged against us. They had not charged the fixing of fees, but they are doing it now, and I have discussed the fixing of fees.

1154 Then they say under Paragraph 34:

"(a) Prepaid medical care organizations other than those sponsored by the defendants have been pre-

vented and hindered in entering into or expanding their business in Oregon."

They have only increased three or fourfold—three or four hundredfold. I guess it is three or four, however. They are doing three or four times as much as they were doing.

The Court: That is because we have had a war and the population increased.

Mr. Jaureguy: The population has increased 40 or 50 per cent, and they have increased three or four times, still that way.

The Court: I was surprised how spotty these prepaid activities are. They are not very general over the state.

Mr. Jaureguy: One of the witnesses—I think it was Dr. Moore—first said there wasn't any place in the state that they did not operate. I think he said there might be some small towns. They have only proved there has been a failure to take tickets in a few of the counties. Mr. Bechtold expressed surprise that any other counties were involved.

While I am talking about that, let me call your Honor's attention to this: Marion-Polk. Those two counties have one medical society. If the medical society was itself inducing or coercing doctors, you could expect it to be uniform over one medical society's territory, but in Marion County none of the doctors took tickets, or very
1155 few of them took tickets,—and when we put on our case we can explain that,—whereas in Polk County they all took them.

"The business of such organizations outside the State of Oregon has been impeded and their ability to do business outside Oregon has been impaired."

There is certainly not a scintilla of evidence on that.

"(b) The public in and out of Oregon has been deprived of a fair and free opportunity to acquire prepaid medical care insurance from organizations competing with one another in a free market."

That is absolutely silly, absolutely silly. There is probably eight times as much prepaid medical care sold now as there was in 1935—seven or eight times as much, anyway. That is, these commercial hospital associations, with the practices that they indulged in at the beginning of this so-called conspiracy, and the OPS and all of the doctor-sponsored organizations.

"(c) Members of the public in and out of Oregon have been deprived of medical care, which, save for the restraints herein described, would have been afforded them."

They cannot name the name of a single member of the public who has been deprived of medical care for that or any other reason.

"(d) Business concerns in and out of Oregon have
1156 been deprived of the opportunity to obtain prepaid medical care insurance for their employees in an unrestricted market, and their business within and outside the State of Oregon has been adversely affected thereby."

Well, now, we know now why the lumber dealers are not selling more lumber—because of this prepaid medical care. Why, your Honor, it is preposterous to say that anything like that has happened.

"(d) Business concerns in and out of Oregon have been deprived of the opportunity to obtain prepaid medical care insurance for their employees in an unrestricted market—" I have already read that.

"(e) Doctors have been deprived of an opportunity to practice medicine in Oregon on terms of their own choosing, pursuant to the laws of Oregon."

I have got to pause there. In their More Definite Statement they listed about 175 doctors, 150, something like that, and they said those doctors had been subjected to specific coercion, compulsion, harassment, threats and oppression, as a result of which they have been unable to practice medicine in accordance with their own wishes, and we found out that they got that list from letters from doctors who had written in sometime in the past, saying that they would not take tickets or would not work for hospital associations or something like that, starting in the fall of 1937 and ending in 1948—I mean the letters came in then.
1157 It is my understanding they subpoenaed all those doctors, but you did not hear them on the witness stand. I could only suggest one reason why they did not call them and that is that they already put one on for a deposition—he was leaving for the East, so they took his deposition, and they put the deposition in evidence, and when they heard the recital by that doctor of his experiences with one of these hospital associations, way back in the '30s,—

The Court: Doctor who?

Mr. Jaureguy: Dr. Sears of Salem.—then, they had enough. They could not prove that any of these doctors had been subjected to coercion, compulsion, harassment, threats or pressure, and so at the very last day of the trial they handed in an amendment to the More Definite Statement wherein they said these doctors that sent in letters were now taking tickets, willingly or unwillingly,—they didn't know which.

Now, as a matter of fact, we know that a lot of the doctors who sent in letters did thereafter take tickets. In Jackson County, for instance, which has been one of the focal points of their vicious attack, doctors sent in letters in 1938, in December. In 1940 they put right on the minutes of their meeting that every doctor would do as he liked and a few months later they sent in letters saying, "Put us all on the list."

1158 The last day of the trial you remember an employer testified. He was testifying about Medford and Ashland and had had this prepaid medical care in one of the commercial hospital associations for years; it first came to his attention in 1945 that the doctors were not taking tickets.

They have not proved a single doctor who sent in a letter did not thereafter take tickets, but I have gone over the matter of ticket-taking pretty thoroughly, so I won't linger longer on that subject except to say that there is an absolute lack of any evidence that any doctors in Oregon, by reason of the conduct of the defendants, has been deprived an opportunity to practice medicine in Oregon on terms of his own choosing.

"(f) Doctors in Oregon and outside of Oregon have been denied the use of hospital facilities in Oregon."

Of course, there is no truth to that.

"(g) Hospitals in Oregon have been denied the privilege of making their facilities available to doctors and members of the public."

Where do you get any evidence of that? Not in the least. Not a scintilla.

"(h) The market for the sale and distribution of medicines, drugs, medical supplies, and medical equipment has been unduly restricted."

Where have they any evidence of that?

Well, that finishes what they have charged us with and what the results were.

I wonder if I could take a few minutes on the
1159 interstate features?

The Court: Before you close, I want you to discuss the Apex case.

Mr. Jaureguy: I will do that, your Honor, in connection with what I am going to take up now.

I start this, your Honor, with the opinion of the Supreme Court of the United States that has been cited with approval many times by the Supreme Court, I think the last time in the case of the United States against Frankfort Distilleries, another the Mandeville Island Farms last year, which cites the Industrial Association case, Industrial Association of San Francisco v. United States, 268 U. S. 64, which really followed the first Coronado Coal case, 259 U. S. 344.

What I am talking about from now on has to do with the interstate commerce features, whether the interstate commerce features have been proven and what the results have been.

That was an association of building contractors who banded together to counteract union activities, particularly with respect to the open shop. They had agreed among themselves there would be no discrimination against any employee on account of non-affiliation with a labor union, and, in order to enforce that, they adopted what they called a "permit system." Under that permit system they would see to it that sales of building materials were made only to contractors who supported this plan. Some of these building materials had been brought into California
1160 from other states. Many of them were things which were locally produced, locally produced products.

Members of the organizations subscribing to the plan, if they violated it, they were fined and expelled and the Court says: "—other methods not necessary to be recited, in part persuasive and in part coercive, were adopted and enforced in order to secure a thorough-going maintenance of the plan."

The lower court issued an injunction on these grounds:

Permits were required for purchase of building materials brought in from other states.

Permits, even if limited to California products, nevertheless interfered with free movement of building materials from other states; and

Persons in other states had been directly prevented or discouraged from shipping building materials and supplies into California.

Here is what the court said, the Supreme Court of the United States:

"The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was purely local matter; namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions."

This sentence particularly is applicable:

"The facts and circumstances which led to and
1161 accompanied the creation of the combination and the concert of action complained of, which we have briefly set forth, apart from other and more direct evidence, are 'ample to supply a full local motive for the conspiracy,'" citing the Coronado Coal Company case.

Just as in this case, the facts are such that they supply a full local motive for the conspiracy; that is, the preservation of the doctor-patient relationship and the welfare of the doctors and patients within the State of Oregon.

There had been some of these materials, as I stated, brought in from other states, particularly plaster, and the Court said: "The evidence is that the permit requirement was confined to such plaster as previously had been brought into the state and commingled with a common mass of local property, and in respect of which, therefore, the interstate movement and the interstate commercial status had ended."

With respect to the lack of free movement of materials from other states, coming into California, the Court said, at Page 854: The Court conceded that such was the fact, but "It was, however, an interference not within the design of the appellants, but purely incidental to the accomplishment of a different purpose."

Then we get to the third point which I mentioned this morning, and that is they had actually communicated with out-of-town dealers and discouraged them from sending their goods into California, and the Court said:

1162 "However this may be, and whatever may have been the original situation, the practice was abandoned long before the present suit was instituted, and nothing appears by way of threat or otherwise to indicate

the probability of its ever being resumed. Under these circumstances there is no basis for present relief by injunction."

So, then, your Honor, that case held three things: One was that since the facts were such as to be ample to supply a full local motive for the conspiracy, it was not within the Sherman Act.

Secondly, though the system interfered with movement of supplies from other states, this was "purely incidental to the accomplishment of a different purpose."

Third, though defendants had induced out-of-state supply houses not to ship in materials, "the practice was abandoned long before the present suit was instituted." That is an opinion by Justice Sutherland.

That case was cited with approval in Levering and Garrigues Company v. Morrin, 289 U. S. 103.

This involved building materials also, and the Court said at Page 1065:

"Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means
1163 of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. Use of the materials was purely a local matter and the suppression thereof the result of a pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy."

They also quote from Industrial Association, the Industrial Association case, Page 1066, as follows:

"The alleged conspiracy and the acts here complained of spent their intended and direct force upon a local situation—for building is as essentially local as mining, manufacturing or growing crops—and if, by a resulting diminution of the commercial demand interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

Then, the National Labor Relations Board v. Jones & Laughlin, that famous case which, as your Honor will

undoubtedly recall, was the case that held the Wagner Act to be constitutional.

As your Honor, as I recall, had occasion to point
1164 out in the Columbia River Packers' case, the reach of the Sherman Act on these interstate commerce matters is not as great as the reach of other acts, and that has been pointed out by other courts, including the Supreme Court of the United States in this Jones & Laughlin case. They cite this Industrial Association case with approval, and also the Coronado Coal case, and point out in the Coronado Coal case they had said that "If Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint"; in other words, that Congress could have gone as far in the Sherman Act as they did in the Wagner Act, but did not, and the Court pointed out that in the Wagner case they did because it relates to anything affecting commerce.

Then, in the Apex Hosiery case which cites with approval the Industrial Associations case to the effect that "It was necessary for it (the court) to find an intent on the part of respondents to cause the prohibited restraint of commerce." The Apex case is in 310 U. S. 469.

I assume your Honor is familiar with the facts of the Apex case. The Court says:

"We think also, as petitioner contends, that the jury's verdict must be taken as a finding supported by evidence that respondents intended to prevent petitioner's shipments in interstate commerce in the sense that respondents
1165 must be taken to have intended the natural and probable consequences of their acts."

The Court went to some length to point out that the defendants in the Apex case were not shielded from liability by reason of the Clayton Act and the Norris-LaGuardia Act, and said:

"But the Sherman Act admittedly does not condemn all combinations and conspiracies which interrupt interstate transportation." At Page 1317 the Court says: "There is abundant support for petitioner's contention that the effect of the sit-down strike was to restrict substantially the interstate transportation of its manufactured products, so as to bring the acts of respondent by which the restriction was effected within the reach of the commerce power if Congress has seen fit to exercise it."

Then the Court pointed out other statutes and particularly the Wagner Act, which reached out further than the Sherman Act, and, in this case, particularly the Wagner Act.

Finally the Court said:

"It was thus made apparent that in saying that 'indirect obstructions' to commerce were not condemned by the Sherman Act where the conspiracy is not directed at that commerce, the Court was not seeking to apply a purely mechanical test of liability, but was using a shorthand expression to signify that the Sherman Act was directed only
1166 at those restraints of whose evil consequences are derived from the suppression of competition in the interstate market, so as 'to monopolize the supply, control its price or discriminate between its would-be purchasers.'"

Then, again in the Frankfort Distilleries case, 324 U. S. 293, in which the distilleries throughout the country went down into Colorado and tried to compel all the dealers to "fair trade" all the liquor under a Fair Trade agreement, a price-fixing agreement, those were distilleries that had other distilleries outside the state, and it was with reference to liquors that they were proposing to ship into the state, and the Court distinguished the Industrial Association case where everything happened within the state and they say:

"It is true—"

First, the Court says:

"These two questions thus posed relate to the extent of the Sherman Act's application to trade restraints resulting from actions which take place within a state. In resolving them, there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states.

"It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, in so far as those aims were not
1167 motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. The cases relied upon by respondents fall within this category," citing the Industrial Association case and others.

Then, finally, in the Mandeville Island Farms case (334 U. S. 219), the Court also again distinguished the Industrial Association case and said:

"In view of this evolution, the inquiry whether the restraint occurs on one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented," citing the Industrial Association case.

Also, referring to the Frankfort Distilleries case, the Court said:

"Moreover, as we said in the Frankfort Distilleries case, 'there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states.'"

Then, very recently,—in fact, this last January,—This is a District Court holding—United States v. Greater Kansas City Chapter, etc., 82 F. Supp. 147, District of Missouri: In that case a certain electrical contractor
1168 entered into an agreement that if any builder wanted them just to furnish services and not the electrical appliances, they would not only charge an amount equal to the value of the services but what profit they would have made on the electrical equipment if they had furnished it, and the Court said that was not in violation of the Sherman Anti-Trust Act because of its lack of restraint on interstate commerce, notwithstanding the fact that these electrical supplies came from other states into Missouri. The Court said:

"Whether the defendants furnished the equipment or whether the owners and builders furnished the electric materials, the flow of commerce would continue just the same."

The Court: We will recess and then you can close, Mr. Jaureguy.

(Recess.)

Mr. Jaureguy: In this Kansas City case, where the contractors forced the builders to buy electrical supplies from them and nobody else, the Court recognized and quoted the Apex case:

"The effect upon the commerce resulted naturally and inevitably from the cause."

But, because it was purely a local situation, even though it did indirectly restrain interstate commerce, it did not come under the Sherman Act.

Now, there are other well-known cases that I will just refer to: National League v. Federal Baseball Club,
1169 269 Fed. 681, and the more recent baseball case, Gardella v. Chandler, 172 Fed. (2d) 402, where there are three opinions, one by Judge Chase, one by Learned Hand, which was really the opinion of the court, and one by Judge Frank. Judge Frank, I may say, made the mistake of thinking that the reach of the Sherman Act was the same as the reach of the Labor Relations Act and the other acts.

And, in addition to your Honor's opinion in the Columbia River Packers case and these cases from the Supreme Court of the United States that I have referred to, I would refer your Honor to a very fine opinion on that subject by Judge Biggs in the Apex case in 108 Fed. (2d) 71. And there is one other case in the Supreme Court of the United States, and that is Federal Trade Commission against Bunte Bros. That did not involve the Sherman Act, but it involved the Federal Trade Act, where the language is: "unfair methods of competition in commerce," which is certainly as broad, if not broader, than the language of the Sherman Act, "restraint of trade or commerce among several states."

And there again the Court held, in an opinion by Mr. Justice Frankfurter, that the reach of that Act did not go as far as the other acts, particularly referring to the National Labor Relations Board, the Bituminous Coal Act, and the Federal Employees Liability Act.

Now, when the American Medical case which I
1170 have referred to so often was trying to get into the Supreme Court on a petition for certiorari, and the Government was opposing the granting of a writ, here is what the predecessors of our friend told the Supreme Court. This is on Page 20 of their brief:

"Petitioners also urge that the question decided by the Court of Appeals is one of substance relating to the construction of the statute of the United States. But the Court has construed only Section 3 of the Sherman Act only in so far as that section relates to activities wholly within the District of Columbia." I am omitting the citations.

"The decision below is, therefore, the equivalent of a construction of the statute limited in its operation to the District of Columbia, which this Court will not ordinarily review. It is unlikely that the holding of the Court of Appeals that restraints upon the practice of medicine fall within the meaning of the words 'restraint of trade' in Section 3 will influence the enforcement of the Sherman Act beyond the District of Columbia. Section 1, which also prohibits combinations in restraint of trade, is limited in its application to restraints affecting interstate"—that is italicized—"trade and commerce. Since the practice of medicine is usually an intrastate activity, it is not likely that Section 1 could be invoked against restraints upon the practice of medicine in the states."

Now, they talk about the practice of medicine,
1171 but the question there was prepaid medical care as well as the practice of medicine. That was what they told the Supreme Court in that case—I mean their predecessors. I am not accusing them of inconsistency.

I suppose that they will refer, as they did in their brief, to the Southeastern Underwriters Association case, involving insurance companies. That is in 322 U. S. 533. But there the business that was done in a state was done by a foreign corporation. Both the execution of the contract and the performance of the contract, both of them—and here neither of them—were done almost exclusively by interstate commerce. That is, when they wrote a policy it was the corporation of one state writing a policy in another state, and when they performed it by paying the loss it was likewise performed by a corporation in one state and a citizen of another state.

The Court there says: "This business is not separated into 48 distinct territorial compartments which function in isolation from each other." But the practice of medicine is separated into 48 distinct territorial compartments. "Interrelationship, interdependence and integration of activities in all the states in which they operate are practical aspects of insurance companies' methods of doing business."

So in that case that cannot be considered as an authority that in the present case there is any restraint of commerce among several states.

1172 I could go on and summarize, but I think I have taken enough time, your Honor.

Mr. Marcus: I do not intend to take up much time.

The Court: You will be entitled to close, Mr. Jaureguy, if you wish to. It is your motion, Mr. Jaureguy. You will be entitled to speak again, if you wish to.

Mr. Marcus: Then I will take even a shorter time than I had intended.

The remark has been made by Counsel that the Sherman Act is somewhat limited in its scope. That is certainly the impression I got from listening to Counsel. We have cited in our brief four Supreme Court cases in which the Court expressly said that Congress in the Sherman Act meant to exercise its interstate commerce powers to the fullest extent.

Now a significant thing, I think, with respect to those remarks, is the cases in which they are found. The first is the Atlantic Cleaners & Dyers case. Now that was a case which arose in the District of Columbia. The next case is the Apex case, that same case that counsel for the defendants discussed at some length. Then we have the Underwriters case, and then we get the Frankfort Distilleries case. Three of the cases dealt with activities outside the District and one case dealt with activities within the District, all those cases stating that Congress had intended in passing the Sherman Act to exercise its interstate commerce powers to the fullest extent.

1173 I may also say, your Honor—I think this is quite well known—that it is common practice when the Supreme Court comes to write an opinion in a labor case or in a Sherman Act case, and the question is whether or not there is jurisdiction in the court because of interstate commerce, to cite freely from one type of case to another type of case. That has been done in labor cases, citing Sherman Act cases, and in Sherman Act cases it has been done with respect to citing labor cases.

There is one quite recent case out. As far as I know, it is the latest case decided by the Supreme Court in which the question of interstate commerce was involved in an anti-trust case. That is the case of United States against Women's Sport Wear Association, 336 U. S. 460.

There is also a very recent case decided by the District Court in Missouri, United States against Universal Milk Company. That case, I believe, has been reported within the past month in the Advance Sheets. I don't know the exact citation. That case again dealt at some length with

the question of whether or not interstate commerce was involved in an anti-trust case.

Now, Counsel has mentioned the Associated Press case and has referred to Judge Hand's opinion in that case. I only hope that your Honor will read that case as well as the two other cases in our brief which we have cited and which were written by Judge Learned Hand. They are United States against Aluminum Company and the case of Greater New York Live Poultry against
1174 the United States, 47 Fed. (2d) 156.

In listening to Counsel this morning and in part this afternoon one at times got the impression that we were dealing here with one defendant; that one defendant had decided to do something; that there was one defendant who had decided to take certain steps in order to effectuate what it had decided to do. That is not this case at all. This is a case where there are a number of defendants, where we have charged and we believe the proof to show that they combined to do certain things and that they have done those things in combination.

Counsel for the defendants has also talked at some length as to the question of whether or not the Sherman Act relates to services in contradistinction to its relation to commodities. In my opening statement I took the position, as I now take, that as in the American Medical Association case, when it reached the Supreme Court, that is a question which we need not decide at all because there that was the major contention made by the A.M.A. defendants when they reached the Supreme Court, and the Supreme Court said that it didn't have to reach that question because there they held that it mattered not whether there was a competitor involved or whether it was any one of several classes of persons who inflicted the restriction found by the courts below. It was sufficient that the object of that restriction was an association or a corporation engaged in business.

1175 Now, we are prepared to meet the defendants on their own ground with respect to whether or not services come within the Sherman Act. And, as I say again, your Honor, that is a question which this Court need not decide. And in that connection, since Mr. Jaureguy has cited the real estate case in the District of Columbia, I would call your Honor's attention to the cases we have cited in our brief which deal with the question of services under the Sherman Act. One of them is the Atlantic